92-862

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

EDWARD B. SMITH, III

Petitioner,

v.

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

EDWARD B. SMITH, III
211 Tennessee Avenue, N.E.
Washington, D. C. 20002
(202) 546-1577

Petitioner Pro Se

QUESTIONS PRESENTED

1. Whether a statute which states that the Agency shall make a decision on the petitioner's answer within forty-five days after it is filed is mandatory on the Agency.

2. Whether the penalty of removal was reasonable under the circumstances presented in this case.

3. Whether the finder of the facts did not review all the evidence in finding that I threatened Ted Richardson. There was nothing to support the allegations except his sole testimony. The hearing examiner herself specifically found that neither party was credible but she went on to say Mr. Richardson was a little more credible than Mr. Smith. Whether under the circumstances presented in this case with a finding of lack of credibility of both parties, the findings should have been in favor of the employee.

**PARTIES TO THE PROCEEDINGS
IN THE
DISTRICT OF COLUMBIA COURT OF APPEAL**

Petitioner, Edward B. Smith, III and Respondent, Department of Housing and Community Development, have been parties to the litigation from the beginning.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING.....ii

TABLE OF AUTHORITIES.....iii

OPINIONS BELOW.....2

STATEMENT OF JURISDICTION.....4

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....4

STATEMENT OF THE CASE.....5

ARGUMENT.....17

I. THE HEARING EXAMINER'S AND THE OFFICE OF EMPLOYEE APPEALS CONCLUSION OF LAW THAT SPECIFICATION NUMBERED 3 OF CHARGE 1 AND SPECIFICATIONS 1 AND 2 OF CHARGE NUMBERED 2 ARE STALE IS CLEARLY ERRONEOUS.....17

II. SPECIFICATION NUMBER 2 OF THE SECOND CHARGE WAS NOT PROVEN BY A PREPONDERANCE OF THE EVIDENCE AND ACCORDINGLY, IT MUST BE REVERSED.....24

III. THE HEARING EXAMINER'S FINDINGS THAT SPECIFICATION NUMBERS 3 AND 4 CLEARLY CONSTITUTE DISCOURTEOUS TREATMENT ARE CLEARLY ERRONEOUS.....29

CONCLUSION.....35

APPENDIX.....1a

TABLES OF AUTHORITIES

Page

Dwight v. Veterans Administration.
F.M.P.B. Docket No. BN 075209068..... 34

Gregg v. United States Air Force,
M.S.P.R. 294 (1982)..... 31

Hendricks v. Department of Interior,
10 M.S.P.R 486 (1981)..... 20

Jones v. Farm Credit Administration,
3 M.S.P.R. 471 (1980)..... 28

Mattes v. Department of the Army,
24-M.S.P.R. 477 (1984)..... 34

McGrath v. Department of Navy,
4 M.S.P.R. 500 (1981)..... 20

Morris v. Navy Weapons Support Center,
F.M.S.B. Docket No. CH 07528110114..... 34

Scherer v. Department of Treasury,
M.S.P.B. Docket No. D.C. 075209226..... 34

Schofield v. Veterans Administration
7 M.S.P.R. 92 (1981)..... 31

Thomas v. Barry..... 26

Weaver v. Department of the Navy,
MSPB 297 298-299, 2 M.S.P.B. 129,
132-133 (1980)..... 34

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PETITION FOR WRIT OF CERTIORARI FROM THE
DISTRICT OF COLUMBIA COURT OF APPEAL

Petitioner, Edward B. Smith, III, respectfully request that a writ of certiorari issue to review the judgment and opinion of the District of Columbia Court of Appeals.

OPINIONS BELOW

By letter dated September 11, 1984, Ms. Emelda Heller, Acting Deputy Administrator, Housing and Business Resources Administration, District of Columbia Department of Housing and Community Development, issued a proposal to remove the Appellant from his position as Property Inspector, DS-0301-09. The proposal was based on two charges: (1) Insubordination in that he allegedly refused to comply with a direct order by a superior which does not endanger the safety of persons, and (2) discourteous treatment of the public, supervisor or other employees in that he allegedly threatened bodily harm of another. On October 19, 1984, the Appellant responded to the charges and on November 20, 1984, the Agency issued its final decision removing the Appellant from his position, effective November 30, 1984.

The Appellant timely filed an Appeal to the Office of Employee Appeals and a hearing was held in his matter before the Honorable Presiding Official on June 2, 1986. On May 26, 1987, the Presiding Official issued her initial decision affirming the Agency's decision to remove the Appellant from his position. The Office of Employee Appeals issued its decision on June 9, 1989, and it was received by Appellant's Counsel June 22, 1989, and by the Appellant on June 26, 1989. The Office of Employer Appeals decision was appealed to the Honorable Harriett Taylor of the District of Columbia Superior Court. By memorandum decision dated March 9, 1980 and received by Appellant's Counsel on March 26, 1990. Judge Harriet Taylor affirmed the decision of the Office of Employee Appeals. The District of Columbia Court of Appeals affirmed Judge Taylor's decision.

STATEMENT OF JURISDICTION

The District of Columbia Court of Appeals decision was dated July ~~26~~ 31, 1992. This Petition was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1252(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS - INVOLVED

The decision violates my right to due process of law.

STATEMENT OF THE CASE

In it's proposal to remove the Appellant from his position, the Agency made the following charges. "Insubordination (Refusal) to comply with .... direct orders by a superior which does not endanger the safety of person ...."; Discourteous treatment of the public, supervisor, or other employee (....threatening . . . bodily harm on another). In support of these charges, the Agency essentially claims that on August 29, 1984, the Deputy Director of the Agency requested a meeting with the Appellant along with the Proposing Official. The Appellant stated that he would not meet with the Deputy Director of the Agency unless it was one or more or that he was permitted to have a representative present. The Appellant also told the Proposing Official that he could not get a representative on such short notice.

When the Appellant explained to the Deputy Director that he desired to have a representative present, the meeting was rescheduled for Friday, August 31, 1984, at which time the Appellant was out on sick leave. Upon the Appellant's return on September 4, 1984, the Proposing Official informed him that the Deputy Director of the Agency wanted to meet with him. Upon his arrival at the Deputy Director's office, the Appellant allegedly refused to sit down, and renewed his request to have a representative present. In spite of his request for a representative, the Director ordered the Appellant to meet, otherwise action would be taken. The Appellant allegedly refused to meet.

In specification numbered 3 under Charge One, the Appellant allegedly refused to meet with his second line supervisor unless the

second line supervisor cleared it with the first line supervisor. According to the charge, the Appellant refused to meet with his second line supervisor after his immediate supervisor instructed him to do so. The Appellant allegedly stated that he would not meet with the second line supervisor unless he received it in writing from his first line supervisor.

The Agency's second charge was "discourteous treatment of the public, supervisor, or other employee (...threatening bodily harm on another....). The Agency's evidence in support of the charge was based on four specifications, which were stated in the following manner:

"Specification No. 1: At approximately 8:40 a.m., on the morning of January 25, 1984, you returned to Mr. Caldwell's office after he refused to put your request in writing and

yelled, "I am going to make an example out of you since Mr. Johns is your supervisor. Mr. Caldwell did not respond to your discourteous statement.

"Specification ^No. 2: At approximately 10:30 a.m., January 25, 1984, Mr. Johns overheard you telling Mr. James Cater, Assistant to Mr. Caldwell, that you were enroute to 59 M Street, N. E. Mr. Johns told Mr. Carter that he had given specific instructions to Mr. Caldwell relative to your future assignments. You turned to Mr. Johns and said, "Why do you have to say that to the Assistant Supervisor?" Mr. Johns waved his hand in a gesture to forget the whole thing. You stated, "Don't wave your hands at me, I'm not a boy, I'm a man and I am not afraid of any man". You became belligerent, literally tearing your jacket from your person. Mr. Cleophas Johnson, having witnessed your

actions, rushed to restrain you. Mr. Johnson and Mr. James Carter witnessed this incident.

Specification No. 3: On August 23, 1984, in the basement of the building, 1133 North Capitol Street, Department of Housing and Community Development, you threatened to inflict bodily harm to Mr. Theodore Richardson, Union Steward, When he approached had other means of taking care of him, then rushed up the stairs towards him with your hand in your pocket.

Specification No. 4: On March 27, 1984, at approximately 5:20 p.m., you threatened Mr. Theodore Richardson, Union corner of the basement of 1133 North Capitol Street, N. E. and threatened to punch his eyes out."

The Appellant filed a timely Answer to the Agency's charges. Essentially the Appellant contends three out of the seven specifications are stale. (Specification 3 of

the Charge 1 and Specification 1 and 2 of Charge 2). The Appellant also contended that he was justified in not meeting with Agency Officials as outlined in Specification 1 and 2. The Appellant denied the allegations set forth in Specifications number 3 and 4 of the Charge 2.

Ms. Emelda Heller, Acting Deputy Administrator, Housing and Business Resources Administration, testified for the Agency in support of Charge 1, Specification 1 and 2. She testified that on August 29, 1984, Madeline Petty contacted her to schedule a meeting with Ms. Heller and the Appellant. Upon arrival at Ms. Petty's office, the Appellant told Ms. Petty that he was willing to meet with her, but he wanted to have his Attorney present.

The Appellant also told Ms. Petty that he would meet with her that day in a one on one

situation. After Mr. Smith had explained his situation to Ms. Petty, Ms. Petty rescheduled that meeting for August 31, 1984. On the latter date, Mr. Smith did not come to work because of illness.

There was no evidence presented at the hearing from which it could reasonably be inferred that Ms. Petty ordered that Appellant to meet and that he disobeyed her order. In fact, the evidence clearly suggest the contrary because Ms. Petty rescheduled the meeting after the Appellant indicated he would meet with her one on one or if others were present, he wanted Counsel present.

It is thus clear that the facts set forth in Charge 1, specifications one, does constitute insubordination and this specification must therefore be rescinded.

It is also apparent that no evidence was submitted at the hearing to show the purpose

of the meeting.

Ms. Heller also testified that on September 4, 1984, the meeting was rescheduled when Mr. Smith returned to work. This meeting was held in Mr. Clay's office. Present at the meeting were Mr. Clay, Ms. Petty, Ms. Heller and Mr. Smith. Mr. Smith told Mr. Clay to meet or leave his office. There was no evidence submitted at the hearing to show the purpose of the meet. The purpose of the meeting is critically important to a determination as to whether or not the meeting would have violated the appellant's rights, and whether it was necessary for him to have an Attorney present to protect his rights. The burden of the proof was on the Agency to prove its case and since no evidence was submitted to show the purpose of the meeting, this specification must fail because the finder of fact cannot determine whether or not

the Appellant's failure to meet was justified.

The evidence in the file and the Appellant's testimony reveal that he had retained Counsel, but his Counsel was not available that day. The Appellant, at the time this meeting was requested, had an adverse action pending against him in which a final decision had not been made and it would have been improper for Agency to discuss that matter with him. Since the purpose of the meeting was not explained to the Appellant, and since he has adverse action already pending against him, he was justified in not meeting with Agency officials until his Attorney was present.

Ms. Heller also testified that she, in proposing the penalty of removal, considered prior disciplinary action against the Appellant. She also testified that a lesser penalty would have been imposed if the

Appellant had not been previously disciplined.

With respect to Charge 1, Specification #3, and Charge 2, Specification numbers 1 and 2, the Appellant's position is that the charges and/or specifications must be rescinded because they are stale; and barred by the doctrine of latches. These specifications will be dealt with in the argument portion of the Final Arguments.

Theodore Richardson, Union Steward at the District of Columbia Department of Housing and Community Development, testified that on August 23 and March 27, 1984, the Appellant threatened to do bodily harm to him. Specifically, Mr. Richardson claims that on the basement of the building located at 1133 North Capitol Street, N. E., in the hallway just beyond the bulletin board when he was approached by the Appellant and the two of them engaged in a conversation about what

could and could not go on the bulletin board. The conversation apparently got heated. Mr. Richardson alleges that Mr. Smith pointed an umbrella at him and threatened to punch his eyes out. He also claimed that Mr. Smith asked him "why don't you fight, sucker". Mr. Richardson allegedly reported this incident to his supervisor.

Mr. Richardson also claims that on August 23, 1984, while he was in the stairwell, Mr. Smith came through the door and punched at him while holding his hands in his pocket and threatened to "blow his brains out. Mr. Smith also allegedly rushed up the stairs after Mr. Richardson.

There were no witnesses to either of the incidents referred to above. Not only did the Appellant adamantly deny using any language that could be reasonably be interpreted as a threat, but he testified that Mr. Richardson

was an official in the union that represented Agency Employees, and the Appellant had organized a rival slate which, if elected, would replace the Union in which Mr. Richardson was an official. Mr. Smith also testified that on the two instances in which Mr. Richardson contends the Appellant threatened him, Mr. Richardson had been taking the Appellant's campaign materials off the bulletin board.

Since Mr. Richardson and the Appellant were rivals competing for representation of the employees of the Agency, and since there were not witnesses to these incidents, these two specifications should be rescinded. Under the circumstances, that credibility of Mr. Richardson should be seriously be questioned and this charge should not be upheld since there is no corroboration of the charge.

ARGUMENT

I. THE HEARING EXAMINER'S AND THE OFFICE OF EMPLOYEE APPEALS CONCLUSION OF LAW THAT SPECIFICATION NUMBERED 3 OF CHARGE 1 AND AND SPECIFICATIONS 1 AND 2 OF CHARGE NUMBERED 2 ARE STALE IS CLEARLY ERRONEOUS.

Judge Taylor and the Hearing Examiner clearly missed the point of the Petitioner's Argument and, in fact, she did not deal with the same. Cases cited by the Hearing Examiner, Hendericks v. Department of Interior, 10 M.S.P.R. 486 (1981; McGrath v. Department of the Navy, 4 M.S.P.R. 500 (1981) are not applicable to this case, and those cases are easily distinguishable from this case. The issue in each of the above cases was whether or not the Agency had brought the charges timely and whether the employee's rights were prejudiced by the delay in bringing the charges. In the instant case, the Agency issued a proposal to suspend the

Appellant for thirty days on February 22, 1984, on the specifications referred to above. The Appellant contested the proposal and a final decision was never made. On September 14, 1984, some seven months after the proposal was issued to the Petitioner and three days after it was issued, the instant proposal charging him with the same specifications, the February 22, 1984 proposal was rescinded. No evidence was introduced at the hearing to explain why the Agency did not make a decision. At least the doctrine of latches should bar these charges because the Appellant's rights have been prejudiced.

These specifications are clearly stale and are in direct violation of 1-617.3 D of the District of Columbia Code and Regulations issued thereunder. The above provision provides in relevant part that:

"(a)(1) An individual in the Career and Educational Services against whom an adverse

action is recommended in accordance with the subchapter is entitled to reasons in writing, and to the following:

D. A. written decision on the Answer within 45 calendar days of the date that charges are preferred."

Regulations issued under the above statute and found at Chapter 16 Adverse Actions on Grievance published in the District of Columbia Register on November 13, 1983, provides in section 1604.38 that:

"The decision shall be rendered no more than forty-five (45) days from the date of delivery of the notice of proposed corrective or adverse action; provided that the period may be extended when the employee does the following:

(a) request and is granted an extension of time allotted for answering the notice of proposed action; or

b) agrees to an extension of time requested by the Agency."

The above law and regulations are mandatory and binding on the Office of Employee Appeals and the Superior Court. In issuing her decision, the Hearing Examiner and

Judge completely ignored the above law and regulations because the Agency never issued a decision nor did it seek an extension of time from the Appellant as provided for in the above provisions of Chapter 16. In a case decided by the Civil Service Commission under Part 752-C, Subpart C, of the Civil Regulations where the Regulations only provided that a decision should be made within a reasonable period of time, the Civil Service Commission held seven months to be unreasonable and rescinded the final decision of the Agency. In the latter case, the Civil Service stated that:

"Under letter of August 28, 1974, the appellant was notified of a proposal to suspend him for a ten-day period. The action was based on a single incident involving the Branch Chief. In addition, the letter stated that the effective date of the proposed suspension will be no sooner than fifteen (15) calendar days after receipt of this letter.

It is noted that Section 752.104(a) of Title 5 of the Code of Federal Regulations provided that an employee shall not be suspended except for such cause as will

promote the efficiency of the service. Furthermore, when such action is taken under Part 752.302 of the Civil Service Regulations, the Agency must notify the employee in writing of the action proposed and the reasons therefor specifically and in detail. The employee must be allowed a reasonable time for filing a written answer and supporting affidavit. Following consideration of the answer, the employee must be furnished at the earliest practicable date with a written decision containing the reasons for the action taken, the right of appeal to the Commission, and the time limit therefor.

"The record in the instant case indicates that subsequent to the issuance of the notice of August 28, 1974, no further action was taken by the Agency for over seven months. The appellant was retained on active duty status on an uninterrupted basis. It was not until April 2, 1975 that a decision letter was issued. In its decision, the Agency, taking into consideration the appellant's replay dated September 5, 1974, reached a determination to suspend him for three working days. The suspension was to begin on April 8, 1975, and continue through April 10, 1975. Attention is again called to the fact that more than seven months had elapsed between the time that the notice of proposed suspension was issued and the time that the decision was rendered. It is well settled and accepted principled of law and of reason and fairness that any disciplinary action should be meted out promptly. The redress of a wrongful act cannot be delayed if it is to serve the purpose of a disciplinary measure. Furthermore, we find that an employee cannot be expected to wait indefinitely for an agency

decision. The Federal Personnel Manual Supplement 752-1, Section S705, entitled, Delivery of Notice" stated in pertinent part:

> a. Earliest practicable date. It is important that an agency issue a final decision within a reasonable time after the employee has made his reply . . . No exact minimum period within which this must be done can be established. However, if the agency takes no action for an extended period of time, and gives no indication to the employee that the final action to be taken is still being considered, the employee may be justified in concluding that the agency has abandoned its proposal.

According to the above provision, it is the duty of the Agency to take action within a reasonable time unless circumstances prevent such action.

> "Upon review of the record, we find that the agency failed to issue a decision without undue delay and did not offer evidence to show whether it was prevented from acting promptly by unusual or extenuating circumstances. Therefore, the agency has not properly complied with the procedural requirements of the applicable regulations in effecting the appellant's suspension. In conclusion, failure to comply therewith constitutes a reversible procedural defect."

Even assuming that the reasonable time

standard is applied, it is clear that these specifications are stale. It is also clear that the agency failed to offer any evidence at the Hearing to justify its failure to issue a final decision. The Agency therefore waived its right to include these charges as part of the charge.

The above Statute and Regulations issued by the District of Columbia contains a definite time standard (45 days) in which to issue a final decision. The language of the Regulations are mandatory in that is says the decision shall be rendered within forty-five days. The Agency does not have discretion to extend this period except as defined in the Regulations.

Thomas v. Barry cited by the office of Emplcyee Appeals is not applicable because under the reasoning of the Board, there would never be an instance where the charge would be

stale. It is clear in this instance that the reasonable time doctrine would be more consistent with the purpose of the above statute. If the time doctrine is not applied then latches should be applied.

For the foregoing reasons, the Hearing Examiner's decision must be reversed with respect to these charges.

II. SPECIFICATION NUMBER 2 OF THE SECOND CHARGE WAS NOT PROVEN BY A PREPONDERANCE OF THE EVIDENCE AND ACCORDINGLY, IT MUST BE REVERSED.

The employee in this case was instructed to meet with the Director, Deputy Director and his second line supervisor on September 4, 1984. The employee refused to meet with these officials because his Attorney was not available. There was not evidence submitted at the hearing from which it can be determined the purpose for which these officials wanted to meet with the Appellant, but presumably, it involved some form of adverse action because

the Director of the Agency told the Appellant either to meet or face action in the future. The Appellant having told the officials that he would not meet without his Attorney, left the meeting when told that he could meet or leave. The Appellant was justified in his action because the purpose of the meeting was never explained to him and to meet with these officials under such circumstances could have violated his rights. At the time of this meeting, the Appellant had a proposed adverse action pending against him recommending that he be suspended for thirty days. Since the purpose of the meeting was not explained to the Appellant, he was refusing to meet with Agency Officials without his Attorney being present.

This case is similar to William D. Jones v. Farm Credit Administration, 3 M.S.P.R. 471 (1980) in which the Appellant was removed from

properly done in the first instance and to correct the same would destroy his evidence.

The Agency had proposed the Appellant's removal for failure to follow instructions -- among other things, and for failure to complete the audit working papers under standards implemented by his supervisors. The Appellant filed a formal grievance, stating that the audit procedure confirmed to acceptable Agency standards and that the working papers were complete and the failure to follow instructions was unwarranted. The grievance examiner reviewed the work papers and determined that the Appellant had done no further substantive work. The deciding official, upon review of the record, sustained the charge. The Appellant, before the Presiding Official, argued that he was justified in his alleged insubordination, among other things, in his refusal to correct

and complete the audit because the working papers constituted the evidence essential to the disposition of his grievance. Any amendment or change of the original papers might have eradicated the evidence and his right to grieve. The Agency contended that the charges were separate from his grievance. The Merit System Protection Board found that Appellant's refusal to complete the audit was justified. The case was therefore remanded to the Presiding official to determine whether the Agency gave the Appellant proper orders. See also Grant a. Schofield v. Veterans Administration, 7 M.S.P.R. 92 (1981) and Gerald P. Gregg v. United States Air Force, 13 M.S.P.R. 294 (1982), in which the Merit System Protection Board found that the Agency had not proven its case.

The Appellant's position is that since the Agency did not inform him of the reason

for the meeting, and since he demanded that his Counsel be present and since the Agency denies him that request and demanded that he meet with Agency Officials without knowing the purpose of the meeting, he was justified in failing to meet because he already had an adverse action pending against him.

Since the Agency failed to present evidence showing the purpose of the meeting and since it failed to present evidence to show why his counsel could not attend the meeting, the Appellant was justified in not meeting with the Agency Officials.

For the foregoing reasons, it is apparent that the Hearing Examiner's Findings are erroneous and, accordingly, they must be reversed on specification number 2 and 3.

III. THE HEARING EXAMINER'S FINDINGS THAT SPECIFICATION NUMBERS 3 AND 4 CONSTITUTE DISCOURTEOUS TREATMENT ARE CLEARLY ERRONEOUS.

In her findings, the Hearing Examiner

states that:

"Employee gave conflicting answers when asked whether there was any animosity between him and the Union Steward. Union Steward on cross examination gave answers designed to suggest that he was not bias against employee, because of Union matters over which they disagreed, although he tended to interject irrelevant but negative information concerning their relationship with one another. Despite Union Steward's lack of candor concerning his relationship with employees, and the possibility that there may have been some bias on his part, his testimony concerning the incidents was more credible than the employee's. He was more forthright and his testimony was consistent on direct and cross examination. Employee again appeared to be restrained when testifying about the incident. Smith v. DHCD, p. 8 of initial decision."

Since the hearing examiner specifically found that neither of the parties were candid and that they both expressed some form of animosity toward each other, it was error and against the weight of evidence to rule against the employee on these specifications. The Agency had the burden of providing by a preponderance of the evidence the charge if brought against the employee. It failed to do

so under the circumstances presented in this case because there were not witnesses to the incident and the parties were in rival unions and Mr. Smith's Union was attempting to replace the Steward's Union.

The Merit System Protection Board was held that "In reviewing an initial decision, while we afford due deference to the deciding officials credibility assessments, the Board is free to substitute its own determinations of fact, giving the Presiding Officials findings only so much weight as arranged by the record and the strength of her reasoning. Citing Weaver v. Department of the Navy, 2 M.S.P.B. 297, 298-299, 2 M.S.P.B. 129, 132-133 (1980); Mattes v. Department of Army, 24 M.S.P.R. 477 (1984. The Hearing Examiner's Findings does not conform with the applicable standards and the Agency failed to prove its case by a preponderance of the evidence.

For the foregoing reasons, the Hearing Examiner's decision should be reversed. Finally, the penalty assessed by the Agency is unduly harsh in view of the circumstances. Peter H. Dwight v. Veterans Administration, FMPB, Docket No. BN 07520-9068; Michael Morris v. Vany Weapons Support Center, FMSB Docket No. CH 07528110114; Scherer v. Department of Treasury, M.S.P.B. Docket No. D.C. 075209226. In the Scherer case, the Merit System Protection Board, in dealing with the question of severity of penalty, said that the standard to be applied is whether the penalty is unreasonable. In the latter case, the employee was charged with (1) allowing an unauthorized entry of seven persons into the former Embassy of Saudi Arabia on July 5, 1979, without proper relief or advice from competent authority, in order to view fireworks with seven individuals and failure

to report the subsequent removal of the property of Saudi Arabia by one of more of the seven individuals. The presiding official found that the Agency had not proved the third charge by a preponderance of the evidence. The Merit System Protection Board stated that:

"Though he sustained charges (1) and (2), he reversed the Agency action and reinstated the Board's decision about review of any Agency's choice of penalty, Douglas v. Veterans Administration, MSPB Docket No. AT 075299006, April 10, (1978). Therein the Board recognized that to evaluate the nationality of non-factual determinations reached through the exercise of judgment, such as the choice of penalty for employees misconduct, the judicial standard of review is the abuse of discretion standard, but held that the standard to be employed by the Board in such cases is unreasonableness, a standard encompassing greater latitude of review than is typically employed by the Appellant courts in Appeals from missions or Board decisions..." Id at 25.

The Board further stated that:

"{W}henever the Agency's action is based on multiple charges, some of which are not sustained, the presiding official should consider carefully whether the sustained charge merited the penalty imposed by the Agency. In all cases where the appropriateness of the penalty has been placed

in issue, the initial decision should contain a reasoned explanation of the presiding officials to sustain or modify the penalty, adequate to demonstrate that the Board itself has properly considered all relevant factors and has exercised its judgment responsibly."

"The Board suggested twelve factors from which presiding officials might choose to frame the articulation of a reasoned explanation of the choice to sustain or to modify a penalty." Id at 32 and 33.

"Upon review of the entire record in this case, the Board finds that the Agency imposed penalty of removal for the sustained charges were unreasonably harsh. The presiding official correctly adjudged removal unduly harsh; she erred in failing to consider mitigation."

In the instant case, the Appellant had two charges with seven specifications against him. Based on the Hearing Examiner's findings, two of the specifications have already been dismissed and are based on the foregoing Statutes and Regulations. Three additional specifications must be dismissed. In addition, specification 3 and 4 of Charge 2 are not supported by the evidence in the record.

CONCLUSION

For the foregoing reasons, the decision of the Office of Employee Appeals and the Hearing Examiner should be reversed and the Appellant reinstated to his position, with full back pay and all costs of this Appeal, and with reasonable Attorney fees.

Respectfully submitted,

Edward B. Smith III

EDWARD B. SMITH, III
Petitioner Pro Se

APPENDIX

A P P E N D I X

Page

APPENDIX A:

Office of Employee Appeals Recommended Decision 1a

APPENDIX B:

Office of Employee Appeals Final Decision 34a

APPENDIX C:

D. C. Superior Court Decision 46a

APPENDIX D:

D. C. Court of Appeals Decision 59a

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the District of Columbia Register. Parties are requested to notify the Docket Clerk of any formal errors in order that corrections may be made prior to publication. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:

Edward Smith Employee	OEA Docket No. 1601-0032-85
v.	Date of Issuance: May 26, 1987
Department of Housing and Community Development Agency	

RECOMMENDED INITIAL DECISION

INTRODUCTION

By Petition for Appeal filed with the Office of Employee Appeals ("Office") on December 14, 1984, Employee challenged the

decision of the Department of Housing and Community Development ("Agency") removing him from his position as Property Inspector, DS-0301-09, Step 6, effective November 30, 1984. Employee was removed for insubordination and discourteous treatment. At the time of Agency's action, Employee was a permanent employee in the Career Service and had been with Agency for eight years.

A Pre-Hearing Conference was held on October 31, 1985. At that time it was determined that there were material issues of fact in dispute. Therefore, a Hearing was held on June 2 and 3, 1986. Employee was represented by Kurt Berlin, Esq. during the Pre-Hearing Conference. Thereafter, Employee was represented by James A. Price, Esq. Throughout the proceedings Agency was represented by Gilbert Gimble, Esq., Assistant Corporation Counsel. The record in this

Matter was closed effective August 7, 1986, as the Examiner informed the parties at the Hearing. This recommendation is based on the testimony and exhibits received in evidence.

JURISDICTION

This Office has jurisdiction based on D.C. CODE ANN. 1-606.3 (1981).

ISSUES

1. Whether Agency has proven by a preponderance of the evidence that Employee committed the acts of which he is accused.

2. Whether Employee's conduct as set forth in the specifications in the notice of proposal constitutes cause within the scope of D.C. CODE ANN. 1-617.1 (d)(11) and (5) (1981).

3. Whether Agency's penalty was reasonable.

FINDINGS OF FACT

It is undisputed that:

At the time of Agency's action, Employee was a Property Inspector, DS-0301-09, Step 6. He was a permanent employee in the Career Service and had been with Agency for eight years. By letter dated September 11, 1984,

Employee was notified of a proposal to remove him from his position for the following reasons, in haec verba:

Cause No. 1: Insubordination

Specification No. 1: On August 29, 1984, Deputy Director, requested a meeting with {Employee}. {Employee's Acting Supervisor} informed {Employee} of the meeting and that {she} was also instructed to attend the meeting. {Employee stated that {he} would not meet with {Deputy Director} unless {he} met with her one on one; or that {he} had a representative to accompany {him} to the meeting. {Acting Supervisor} told {Employee) to get a representative but {Employee} indicated that {he} could not do so for a meeting the same day. {Employee} and {Acting Supervisor} went to {Deputy Director's} office where {Employee} proceeded to tell {Deputy Director} that {he} would not meet without {his} representative being present. {Deputy Director} then scheduled a meeting for 2:00 p.m., Friday, August 31, 1984. However, on Friday, August 31, 1984, {Employee} did not report for work. Employee used sick leave for the day.

Specification No. 2: Upon {Employee's} return to work on September 4, 1984, {Acting Supervisor} informed {Employee} that {Deputy Director} would like to meet with {him}. {Employee and Acting Supervisor} reported to (Acting

Supervisor's} office. {She} informed {Employee and Acting Supervisor} that the meeting would take place in the Office of the Director.....Upon arrival in {Director's} office, {Employee} refused to sit down. {Employee} stated that {he} would not meet without {his} representative. {Deputy Director} asked {Employee} why {they} could not meet without {his} representative being present and again {Employee} stated that {he} would not meet. {Director} then instructed {Employee} to sit down and meet or action would be taken. Again, {Employee) refused to meet and left the Director's office.

Specification No. 3: On Wednesday, January 25, 1984, ...Acting Deputy Administrator, Housing and Business Resources Administration asked {Employee} to come to his office to talk. {Employee} refused, stating, "You go through my supervisor if you want to talk to me". {Acting Deputy Administrator} then had...{Employee's} immediate supervisor, at that time, to ask {Employee} to go to {Acting Deputy Administrator's} office. {Employee} again refused, telling {Supervisor}, "You put it in writing and I will go to his office". {Supervisor^] informed {Employee} that he would not put {Employee's} demand in writing. {Employee} refused to comply with {Acting Deputy Administrator's} and {Supervisor's} requests, {Employee} never reported to {Acting Deputy Administrator's} office as directed.

Cause No. 2: Discourteous treatment of the public, supervisor, or other employee. (...threatening bodily harm on another...)

Specification No. 1: At approximately 8:40 a.m., on the morning of January 25, 1984, you returned to {Supervisor's} office after he refused to put your request in writing and yelled, "I am going to make an example out of you since {Acting Deputy Administrator} is your supervisor." {Supervisor} did not respond to your discourteous statement.

Specification No. 2: At approximately 10:30 A.M., on January 25, 1984, {Acting Deputy Administrator} overheard your telling...Assistant to {Supervisor}, that you were enroute to 59 M Street, N.E. {Acting Deputy Administrator} told {Assistant to Supervisor} that he had given specific instructions to {Supervisor} relative to your future assignments. You turned to {Acting Deputy Administrator and said, "Why do you have to say that to the assistant supervisor?"

{Acting Deputy Administrator} waved his hands in a gesture to forget the whole thing. You stated, "Don't wave your hands at me, I'm not a boy, I'm a man and I am not afraid of any man." You became belligerent, literally tearing your jacket from your person. {Assistant to Supervisor}, having witnessed your actions, rushed to restrain you....

Specification No. 3: On August 23, 1984, in the basement of the building, 1133 North Capitol Street, you threatened to inflict bodily harm to...Union Steward. When he approached you, relative to your union activities, you indicated that you had other means of taking care of him, then rushed up the stairs toward him with your hand in your pocket.

Specification No. 4: On March 27, 1984 at approximately 5:20 p.m. you threatened...Union {Steward} with an umbrella, pushed him in the West-end corner of the basement of 1133 North Capitol Street, N. E. and threaten to punch his eyes out.

In proposing this action, the following element of your past record was considered.

On April 5, 1982, you were suspended for fourteen (14) calendar days for Insubordination, Discourteous treatment of your supervisor and the public, and efficiency. Thus, the insubordination and Discourteous treatment constitutes second offenses.

On October 19, 1984, Employee, through counsel, filed a response. On November 20, 1984, Agency issued its final notice removing Employee, effective November 30, 1984. Employee filed a timely Petition for Appeal

with this office.

Following is a discussion of the disputed factual issues:

Insubordination

A. Specification Nos. 1 and 2

Employee contends that his conduct does not constitute insubordination, because he never refused to meet with either Deputy Director or Director. In each instance, he argues that he refused to discuss anything with them without a representative being present. He argues that his mere presence in their offices on August 29, and September 4, 1984 constituted compliance with their orders.

This Examiner is not persuaded that Employee's appearance in the offices of the Deputy Director and Director constituted compliance with their orders to meet. However, the Deputy Director modified the

order to meet with her on August 29, 1984. She agreed to reschedule the meeting for August 31, 1984 at Employees request. Employee was absent on approved leave on that day, so no meeting occurred.[1]

This Examiner finds that Employee did not violate an order on August 29, 1984, because the order was modified. This Examiner also finds that Employee did not violate an order on August 31, 1984, because he was on approved leave that day. Employee was, however, ordered to meet with Agency's Director on September 4, 1984 and did refuse to meet with him that day, thereby violating an order of his supervisor. Employee

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[1] Acting Deputy Director testified that she did not consider Employee insubordinate on August 29, 1984 because he was not directed to meet at that point; but that Employee was insubordinate on September 4, 1984 when he refused to meet with the Director.

testified that he did not meet with the Director that day because the Director ordered him out of his office. However, Employee admits that the Director did not order him from his office until Employee stated that he would not meet with the Director without a representative being present. This Examiner finds, based on Employee's testimony, which was corroborated by Acting Deputy Director, that Director did tell Employee to meet with him without a representative or leave his office after Employee stated he would not meet without a representative.

B. Specification No. 3

Employee admits that on January 25, 1984, he was orally ordered by his supervisor to meet with Acting Deputy Director, after Employee had refused to meet with Acting Deputy Director unless ordered by Supervisor.

Employee also admits that he refused to meet, unless Supervisor put the order in writing. His justification for that refusal was that his orders were given to him in writing and this order was not put in writing. Based on Employee's admission and the testimony of record, this Examiner finds that Employee refused to follow a verbal order from his supervisor on January 25, 1984. Agency did not rebut Employee's testimony that Agency gave him his assignments in writing.

Discourteous Treatment

A. Specification No. 1

Supervisor testified that on January 25, 1984, about ten minutes after Employee refused the above reference order, Employee stated to him in a loud voice that he would make an example out of him. Supervisor further testified that Employee was in front of his

(Supervisor's) office, and that Supervisor was inside. Employee testified that he made no comments to his supervisor at that time. Employee did not respond spontaneously on cross examination but requested the questions to be repeated or rephrased before he would answer. Supervisor, on the other hand, appeared more candid and forthcoming while testifying. This Examiner, having observed the demeanor of both witnesses, finds the testimony of Supervisor more credible. Thus, this Examiner finds that Employee did tell his supervisor that he would make an example out of him. Nothing in the evidence of record, however, suggest that
Supervisor perceived Employee's actions as threatening.

B. Specification No. 2

Acting Deputy Administrator testified that on January 25, 1984, Employee became

belligerent, was hostile toward him, and took off his jacket. He further testified that it appeared that Employee wanted to fight. Assistant to Supervisor testified that he was talking to Acting Deputy Administrator on January 25, 1984, and was told that Supervisor had been given specific instructions regarding Employee's assignments. He further testified that Employee stated "I'm a man like you," took off his jacket and turned to Acting Deputy Administrator. Acting Deputy Administrator said "I'm finished with this and I'm not going back into this." Assistant also testified that it was his impression that Employee was not threatening Acting Deputy Administrator and that Employee made no move to close the gap between himself and Acting Deputy Administrator. Acting Deputy Administrator had earlier given a statement in which he stated that Employee had ripped off

his jacket. He testified that on reflection Employee's conduct was not that dramatic, but he still perceived Employee's conduct to be threatening. Employee testified that Acting Deputy Director waved his hands and made a motion as though he were coming toward him. Employee admits that he removed his jacket, but further testified that he left the area without any intervention by Assistant to Supervisor. He also testified that he stated, "I am not a boy, I am a man and I fear no man." He testified that his actions were a reaction to those of the Acting Deputy. Based on Employee's admissions this Examiner finds that Employee said, "I am not a boy I am la man, and I fear no man." This Examiner further finds, based on the testimony of record, that Employee took his jacket off when he said those things, but did not make a move toward Acting Deputy Director.

C. Specification Nos. 3 and 4

Union Steward testified that on August 23, 1984, while in the basement of the building which houses Agency, Employee came towards him with his hand in his pocket and said "he'd blow his brains out" and "fight, motherfucker". He also testified that he was scared because he had heard that Employee carried a gun. He further testified that there were witnesses to the event but since they did not want to come forward he would not use their names. Employee testified that he did not threaten Union Steward; and that he only told Union Steward that "his group was coming out of there.

Union Steward testified that on March 27, 1984, in the basement of Agency's building at 1133 North Capitol Street, N. E., Employee threatened "to punch his motherfucking eyes out" and lunged toward him with an umbrella.

He further testified that Employee did not touch him with the umbrella. Employee testified that he was in the basement with Union Steward; but that he did not have an umbrella and did not threaten him.

Employee give conflicting answers when asked whether there was any animosity between him and Union Steward. Union Steward on cross examination gave answers designed to suggest that he was not biased against Employee because of union matters over which they disagreed, although he tended to interject irrelevant, but negative information concerning Employee in response to questions. This Examiner finds that neither Employee nor Union Steward were candid in their testimony concerning their relationship with one another. Despite Union Steward's lack of candor concerning his relationship with Employee, and the possibility that there may

have been some bias on his part, his testimony concerning the incidents was more credible than Employee's. He was more forthright and his testimony was consistent on direct and cross examination. Employee again appeared to be restrained while testifying concerning the incidents.

ANALYSIS AND CONCLUSION

I. Introduction

OEA Rule 614.2, as amended, provides that an Agency's action will be sustained if it is supported by a preponderance of the evidence, 28 D.C. Reg., 2536 (1981). Thus, Agency has the burden of proving by a preponderance of the evidence that Employee committed the acts of which he is accused. Agency must also establish that the conduct constitutes cause as defined in D.C. CODE ANN. § 1-617.1 (d) (1981). In the instant Matter, Agency has alleged that Employee was insubordinate on

three occasions, treated his supervisor discourteously on two occasions, and treated a co-worker discourteously on two occasions. Insubordination and discourteous treatment are cause within the purview of D.C. CODE ANN. § 1-617.1 (d) (5) and (11) (1981).

II. Insubordination

D.C.O.P. Rule 1608.6 (5)(b) 30 D.C. Reg 5895 (1983)[2] sets forth the following infraction of insubordination:

> Refusal to comply with written instructions and/or by a supervisor which does not endanger the safety of persons or property.

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[2] Agency's notice did not cite this rule but the language in the notice is the same.

In support of the charge of insubordination, Agency has cited three specifications. The incidents are alleged to have occurred on August 29, and 31, 1984, September 4, 1984, and January 25, 1984.

Agency has alleged that Employee was insubordinate because he failed to meet with the Deputy Director on August 29 and 31, 1984. Employee admits that did not discuss anything with the Deputy Director on those days, but argues that his conduct was not insubordinate. As noted in the findings of fact, Employee went to the Deputy Director's office on August 29, 1984, and told her that he would not discuss any matters with her without representation. The Deputy Director agreed to reschedule the meeting. On the date of the rescheduled meeting, Employee was out of the office on approved leave. This Examiner concludes that Employee was not insubordinate

because the order to meet on August 29th was modified, such that Employee was ordered to meet with Deputy Director on August 31st. Employee did not meet with the Deputy on that day, but his conduct did not constitute a refusal to meet, because he was on approved leave that day. Therefore, this Examiner concludes that Employee was not insubordinate on either August 29th or 31st. However, as noted in the findings of fact, Employee did refuse to meet with the Director on September 4, 1984 thereby violating an order of his supervisor.

In written closing arguments, Employee, through his representative, argues that his conduct on September 4, 1984 did not constitute insubordination because the order to meet was unreasonable. Employee argues that he had an adverse action pending against him at the time the meeting was requested and

that he did not want to discuss that matter without his attorney being present. There is no evidence in the record that an adverse action was pending against Employee at that time. Furthermore, Acting Supervisor testified that the purpose of the meeting was to investigate a complaint against Employee, in which case Employee had no due process right to counsel.

This Office has held that an Employee's refusal to comply with an order of his supervisor does not constitute insubordination, if the order is unreasonable or unlawful. Employee v. Agency, OEA Docket No. 1601-0158-81, 32 D.C. Reg. 2907 (1985). The order to meet without legal counsel being present is within the Agency's discretion in an investigatory interview, thus the order was not unreasonable on its face. Furthermore, Employee testified that he did not meet

because he was ordered to leave the Director's office. That contention has nothing to do with the reasonableness or lawfulness of the order. This Examiner finds therefore that Employee was not justified in his refusal to meet with Agency's Director on September 4, 1984 and as such his conduct constituted insubordination.

Finally, Employee argues that his conduct on January 24, 1984, was not insubordinate because the order was not put in writing, and Agency puts other orders to him in writing. As noted above, an Employee is not justified in refusing to obey an order unless it is unreasonable or unlawful. Employee has cited no law, rule, or regulation which requires his supervisor to put all orders in writing, merely because the supervisor puts other orders in writing. Thus, this Examiner must conclude that the order was neither

unreasonable or unlawful and as such, employee's refusal to obey the order constituted insubordination.

Based on the foregoing analysis, this Examiner concludes that Specifications Nos. 2 and 3 of Charge No. 1 should be sustained. Specification No. 1 is not supported by the evidence and should be reversed.

III. Discourteous Treatment

D.C.O.P. Rule 1608.6 (11)(b), 30 D.C. Reg. 5898 (1983) provides that threatening another with bodily harm is discourteous treatment. Agency has cited four incidents where Employee allegedly threatened to inflict bodily harm on his Supervisor, Acting Deputy Administrator, and Union Steward. To sustain its burden of proof that Employee's conduct constituted a threat, Agency must show that Employee's words imparted an expectation of bodily harm, thereby inducing fear and

apprehension in the person threatened.

As noted in the findings of fact, on the morning of January 25, 1984, Employee told Supervisor, "I'm going to make an example out of you since {Acting Deputy Administrator} is your supervisor." Employee was standing outside of supervisor's office when he made the statement. There is no evidence in the record that Supervisor expected Employee to actually harm him, and Employee was not close enough to his supervisor to actually harm him. Based on these circumstances, this Examiner finds that Employee did not threaten his supervisor on January 25, 1984.

Employee later that day told Acting Deputy Administrator that he {Employee^] was a man, not a boy and that he feared no man. Employee removed his jacket when he said that, but, as noted in the Findings of Fact, did not move toward the Acting Deputy. The Acting

Deputy testified that he feared Employee would physically harm him. This Examiner concludes that Employee did threaten Acting Deputy. Employee's words and conduct were sufficient to impart an expectation of bodily harm and did so.

Agency has proven that by a preponderance of the evidence that Employee committed the acts as alleged on August 23 and March 27, 1984. As stated in the Findings of Fact, the testimony of Union Steward was more credible than Employee's. This Examiner finds that the weight of the evidence lies in Agency's favor. Employee's conduct was threatening to Union Steward, who testified that he did fear that Employee would harm him. This Examiner concludes that Employee did threaten Union Steward on March 23, 1984 and August 23, 1984 as alleged by Agency.

Based on the foregoing analysis, this

Examiner concludes that Specifications Nos. 2, 3, and 4 should be sustained. Specification No. 1, however, is not supported by the evidence of record.

IV. Harmful Error

OEA Rule 614.5, D.C. Reg. 4362 (1980) provides that even if an Agency action is supported by a preponderance of the evidence, the action will be reversed upon a showing of harmful procedural error by Agency. Employee alleges that Specification No. 3 under insubordination and Specification Nos. 1, 2, and 4 under discourteous treatment are stale because the incidents occurred eight months prior to the issuance of the notice and that the same specifications were the subject of a prior proposal to suspend Employee which was rescinded three days after the notice of proposal was issued.

The delay is proposing the adverse action

must be unreasonable and prejudicial to employee's ability to present his defense in order to be harmful error. The Federal Merit Systems Protection Board has held that laches will not bar an action where Employee makes no showing of prejudice. Hendricks v. Department of Interior, 10 M.S.P.R. 349 (1982); Woody v. General Services Administration, 6 M.S.P.R. 486 (1981); McGrath v. Department of the Navy, 4 M.S.P.R. 500 (1981). There is no evidence in the record which suggests that Employee's ability to defend himself against the charges was adversely affected by Agency rescinding the earlier action and bringing the charges again. Thus, this Examiner finds that Agency, has not committed harmful error by including the challenged specifications.

IV. Penalty

This Office has held that it will review a penalty imposed by an agency to ensure that

the agency's discretion was properly exercised, by determining whether the penalty is within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on a consideration of the relevant factors; and whether there has been a clear error of judgment. Employee v. Agency, OEA Docket No. 1601-0012-82, 30 D.C. Reg. 352 (1983); Employee v. Agency, OEA Docket No. 1601-0016-81, 29 D.C. Reg. 4565 (1982). It is settled that when Agency's action is based on multiple charges some of which are not sustained, the presiding official must consider carefully whether the sustained charges merit the penalty imposed by Agency. In the instant matter, Employee was removed on a finding by Agency of insubordination and discourteous treatment. Although not all of the specifications under these charges were

upheld, both charges were sustained. These were Employee's second offenses of both insubordination and discourteous treatment.[3]

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[3] This Office recently sustained Agency's 1982 charges of insubordination and discourteous treatment in Employee v. Agency, OEA Docket No. 1601-005-82, ___D.C. Reg. ____( ).

The D.C.O.P. Table of Penalties Guide Provides the following range of penalties for these offenses:

OFFENSE OR INFRACTION	PENALTIES	
	FIRST OFFENSE	SECOND OFFENSE
5. Insubordination b. Refusal to comply with written instructions and/or direct orders by a superior which does not endanger the safety of persons or property.	Suspension for 5 days	Suspension for 15 days to removal
11. Discourteous Treatment b. Fighting, threatening, or inflicting bodily harm on another, or physical resistance to competent authority.	Reprimand to removal	Removal

Removal is within the range of penalties permitted by the table. There are no mitigating circumstances present which would cause this Examiner to find this penalty

unreasonable or an abuse of Agency's discretion. Therefore, this Examiner recommends that Agency's action removing Employee be affirmed.

RECOMMENDED INITIAL DECISION

This Examiner recommends that Agency's action be affirmed.

_____

Frankie M. Foster, Esq.
Hearing Examiner

INITIAL DECISION

The reviewing panel adopts the recommendation of the Hearing Examiner in this Matter and specifically incorporates that recommended decision herein.

ORDER

It is hereby ordered that:

Agency's decision to remove Employee is affirmed.

FOR THE BOARD:
Panel:
George Weaver
Shelia High King
Inez Cain

Sharon P. Banks, Esq.
Chair
Office of Employee Appeals

{257/7:FMF:lm}

Date of Decision

This decision is an initial decision. It will become a final decision of the Office of Employee Appeals on June 10, 1987, unless a petition for review is filed with the Office or the Office reopens the case on its own motion. Any party to the proceeding may file a petition for review.

The Office may grant such a petition, after providing an opportunity for response by other parties, when it is established that:

1. new and material evidence is available that, despite due diligence, was not

available when the record was closed; or

2. the initial decision of the Office is based on an erroneous interpretation of statute or regulation.

All petitions for review shall set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record. The petition for review, containing a certificate of service, must be filed with the Docket Clerk, D.C. Office of Employee Appeals, 415 - 12th Street, N. W., Washington, D. C. 20004, not later than June 10, 1987. Four (4) copies of the Petition must be filed.

Parties wishing to respond to a petition for review must file their response not later than fifteen (15) days after receipt of such petition.

Request for payment of attorney fees

shall be made by motion within thirty (30) days from the date that this decision becomes final. The Agency may file a responsive pleading within fifteen (15) days of receipt of the motion. Any request for attorney fees made before issuance of the initial decision must be renewed within thirty (30) days from the date that this decision becomes final or the Office may consider it waived.

An appeal from a Final Decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia.

APPENDIX B

Notice: This opinion is subject to formal revision before publication in the District of Columbia Register. Parties are requested to notify the Docket Clerk of any formal errors in order that corrections may be made prior to publication. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter:

Edward Smith Employee	OEA Docket No. 1601-0032-85
v.	Date of Issuance:
Department of Housing and Community Development Agency	June 9, 1989

OPINION AND ORDER

ON

PETITION FOR REVIEW

Agency removed Employee from his position on November 30, 1984, based on three (3)

counts of insubordination and four 4) counts of discourteous behavior. Employee timely appealed Agency's action to this Office on December 14, 1984. After a full evidentiary hearing, the hearing examiner found that one (1) count of insubordination and one (1) count of discourteous behavior were supported by a preponderance of the evidence. However, the examiner found Employee guilty on the remaining counts and recommended to a three (3) member reviewing panel of the Board that it affirm Agency's decision to remove Employee from his position. The reviewing panel, by initial decision issued May 25, 1987, adopted the examiner's recommendation in its entirety and upheld Agency's action. However, on June 9, 1987, Employee filed a petition for review before the full Board.[1]

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[1] Employee also requested that the Board provide him with a copy of the official

transcript and then grant him an additional thirty (30) days from his receipt of the transcript to amend his petition. The official transcript in this case has been available to the parties since July 14, 1986. Employee has not explained why he failed to timely request a copy of the transcript or why he was unable to come into the Office and review the official transcript itself before the expiration of the time period for filing his petition for review. Absent such an explanation, we see no reason to grant any further delay. Consequently, Employee's motion is denied.

Agency filed its opposition to Employee's petition on June 30, 1987.

On petition for review, Employee asserts that some of the counts which the examiner sustained were previously included within a February 22, 1984 proposal to suspend him for thirty (30) days. According to Employee, Agency never reached a final decision on this proposed suspension but, instead, included the counts in the instant action and withdrew the earlier charges against him. Employee contends that, since Agency never reached a

final decision on the February 22, 1984 proposed notice, Agency violated D.C. CODE 1-§ 617.3a)(1)(D) and D.C.O.P. Reg. § 1604.38, 30 DCR 5889 (November 11, 1983), which provide that an employee is entitled to a written decision within 45 calendar days of the date charges are preferred. Although the statutory and regulatory provisions on which Employee relies do require an agency to reach a final decision within 45 days, these provisions do not state that if an agency fails to render a decision within this time period, it is thereafter prohibited from withdrawing the charges against an employee and re-issuing them at a later date.[2]

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[2] On the contrary, D.C.O.P. Reg. § 1604.34 states: "The deciding official may permit the proposed action to be withdrawn with or without prejudice at any time prior to decision, and shall so notify the employee." (Emphasis added)

Indeed, these provisions do not specify any consequence whatsoever for an agency's failure to act within the 45 day time period.

The general rule is that a statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time and period and specifies a consequence for failure to comply with the provision. Thomas v. Barry, 729 F. 2d 1469 (D.C. Cir. 1984). Since D.C. Code § 1-617.3 does not specify any consequence for an agency's failure to render a decision within 45 days, the provisions must be viewed as directory rather than mandatory and Agency's failure to comply with it does not render an adverse action invalid. Employee v. Agency, 32 DCR 4396 (July 26, 1985); petition for review denied, 32 DCR 4406 (July 26, 1985); aff.d, Bobby Earl Monk v. District of Columbia, MPA 13-85 (D.C. Super.

Ct. September 16, 1987).

One of Agency's counts of insubordination is based on Employee's refusal to meet with his supervisors on September 4, 1984, Employee contends that he was justified in refusing to meet with his supervisors because they would not inform him of the purpose for the meeting and denied him the opportunity to be represented by counsel. We disagree.

Employee has not cited, nor are we aware of any law, rule, regulation, or policy which requires his superiors to explain the purpose for a meeting before they can order him to attend it or allows Employee to have an attorney present whenever his superiors choose to meet with him. Moreover, Employee's supervisor testified that the purpose for the meeting was to investigate a complaint against Employee. Although due process may require Agency to give Employee notice and a right to

counsel for an adjudicatory proceeding, Agency is snot required to do so for an investigative interview. See Ashford v. Department of Justice, 6 M.S.P.R. 458 (1981. Since Agency was not required to notify Employee of the purpose for the meeting or allow him to be represented by counsel, Employee's refusal to attend the meeting was unjustified.

Agency's charge of discourteous behavior was based in part on its allegation that Employee threatened his co-worker with bodily harm on two separate occasions. Employee denied the charge. The examiner, therefore, allowed both Employee and his co-worker to testify as to what happened on the days in question. After listening to the testimony, the examiner found Employee's co-worker (Union Steward) more credible. Specially, the examiner stated

> Employee gave conflicting answers when asked whether there was any

> animosity between him and the Union steward. Union Steward on cross examination gave answers designed to suggest that he was not bias against Employee, because of Union matters over which they disagreed, although he tended to interject irrelevant but negative information concerning their relationship with one another. Despite Union Steward's lack of candor concerning his relationship with employee, and the possibility that there may have been some bias on his part, his testimony concerning the incidents was more credible than employee's. He was more forth-right and his testimony was consistent on direct and cross examination. Employee again appeared to be restrained while testifying about the incident.

Employee argues that "since the hearing examiner specifically found that neither of the parties were candid and that they both expressed some form of animosity toward each other, it was error and against the weight of the evidence to rule against the employee on these specifications." Again, we must disagree.

The examiner is not required to discredit

all of a witness' testimony simply because some of the testimony is questionable. Providing the examiner is not acting arbitrarily, the examiner may believe or disbelieve a witness' testimony, in whole or in part, even though the witness may have testified falsely with respect to a particular matter, or his or her testimony has been contradicted. 98 C.J.S. § 458 (1957). We do not think it was arbitrary for the examiner to discredit part of the co-worker's testimony and stili find him more credible than employee. Since the examiner had the discretion to find the co-worker more credible than Employee, and considering Employee has not shown that the examiner exercised her discretion arbitrarily, we see no error in her finding that Agency met its burden of proof

with regard to this particular count.[3]

Employee argues that Agency's decision to remove him was unreasonable since the examiner did not sustain one (1) count of insubordination and one (1) count of discourteous behavior. However, we do not find the penalty of removal unreasonable under the circumstances of this case. First of all, even though Agency failed to prove two (2) of its counts against Employee, Agency nevertheless met its burden of proof with regard to the overall charges inasmuch as Agency proved Employee guilty of two (2) counts of insubordination and three (3) counts

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[3] Absent a showing that the examiner's finding is arbitrary, the Board will defer to the examiner on questions of credibility. Employee v. Agency, 33 DCR 7143, (November 14, 1986); Employee v. Agency, ^OEA Docket No. 601-0024-86, ___DCR ____( ).

of discourteous behavior. Second, threatening a co-worker with bodily harm is a very serious offense and this was Employee's second offense of both threatening behavior and insubordination. Third, removal is within the range of penalties set forth in Agency's penalty guide. Finally, Agency attempted an alternative to this action by referring Employee to the D.C. Consultation and Counseling Service for troubled employees, but Employee refused to attend the sessions. In light of the fact that a previous disciplinary action has not curbed Employee's insubordinate and discourteous behavior, and considering that Employee showed little potential for rehabilitation when he refused to attend counseling sessions, we find that Agency's decision to remove him was clearly within the bounds of reasonableness. Accordingly, Employee's petition for review must be denied.

ORDER

It is hereby ORDERED that Employee's petition for review is DENIED.

FOR THE BOARD: _____
Sharon P. Banks, Esq.,
Chair
Office of Employee
Appeals

{308/14RAD:amw} _____
Date

ALL BOARD DECISIONS ARE PREPARED BY THE GENERAL COUNSEL OFFICE'S

RICHARD A. BEVERLY, ESQUIRE, GENERAL COUNSEL

The initial decision in this Matter shall become a final decision of the Office five (5) days after the issuance of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within thirty (30) days after formal notice of the decision or order sought to be reviewed.

APPENDIX C

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

EDWARD R. SMITH,	)
	)
Petitioner,	)
	)
v.	)
	)
D.C. DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT,	)
	)
	)
Respondent.	)

MEMORANDUM OPINION AND ORDER

FACTS

The Department of Housing and Community Development (hereinafter "Agency") notified Petitioner on September 11, 1984 of a proposal to remove him from his position as Property Inspector. The reasons for removal cited by Agency were (1) insubordination based on three different specifications and (2) four instances of discourteous treatment of others. Petitioner has previously been suspended, in

1982, for the same offenses.

The insubordination charge is based on the following specifications:

(1) employee refused to attend meeting with supervisors on August 29, 1984, without his attorney present.

(2) he refused to attend another meeting on September 4, 1984.

(3) on June 25, 1984, employee again refused to meet with his superiors unless the order was put in writing.

The discourteous treatment charge stems from Petitioner's allegedly hostile treatment of the public, supervisor and other employees. The specifications supporting this charge are:

(1) verbal abuse towards supervisor.

(2) physical display of belligerence towards acting deputy administrator.

(3) threats to inflict bodily harm on the Union Steward.

(4) threatening the Union Steward "with an umbrella."

The most serious allegations are those concerning Petitioner's confrontations with

the Union Steward. Petitioner adamantly denied these allegations, arguing that the Union Steward held some animosity towards him because of his efforts to organize a rival union. The hearing examiner found the employee guilty on two counts of insubordination under D.C.O.P. Rule 1608.6(5)(6), 30 D.C. Reg. 5895 1983), and three counts of discourteous behavior under D.C.O.P. Rule 1608.6 (11)(b), 30 D.C. Reg. 5898 (1983). The examiner recommended affirmance of the Agency's decision to remove employee. The reviewing panel adopted the examiner's decision and upheld Agency's action. The Office of Employee Appeals (OEA) denied Employee's petition for review. Employee now petitions this court to review and reverse the decision of the OEA.

ISSUES

Petitioner makes four arguments:

(1) that the hearing examiner and the OEA were clearly erroneous for failing to find that three of the specifications supporting the charges of insubordination and discourteous treatment were "stale;" (2) that there is insufficient evidence to prove insubordination; (3) that the finding of discourteous treatment is clearly erroneous and, finally, (4) that the penalty imposed is too harsh. All four arguments are without merit.

(1) Claim of "stale" charges.

Petitioner asserts that specification 3 supporting insubordination and specifications 1 and 2 supporting the discourteous treatment charge are stale and thus should not be considered. These incidents were the subject of a prior proposal to suspend Employee in which the Agency never reached a final decision. Instead, the Agency included these

specifications in a new notice of proposal issued seven months later. Petitioner asserts that these specifications are in direct violation of D.C. Code 1981, § 1-617.3(a)(1)(D), which reads:

> An individual in the Career and Educational services against whom an adverse action is recommended in accordance with this subchapter is entitled to reasons, in writing, and to the following:
>
> A written decision on the answer within 45 calendar days of the date that charges are preferred.

Petitioner claims that because his rights were prejudiced by the delay in bringing charges, in violation of the statute, the Agency should be estopped from relying on these specifications.

The OEA has previously ruled that an Agency's failure to comply with the above statute does not, by itself, warrant a reversal of the Agency's adverse action. Employee v. Agency, 32 D.C. Reg. 4396 (May 4,

1984), petition for review denied, 32 D.C.R. 4406 (July 26, 1985), aff'd, sub nom. Monk v. District of Columbia, MPA 13-85 (D.C. Super. Ct., September 16, 1987). Although the statute contains a definite time standard, it is simply meant to serve as a procedural guideline to the Agency. Such procedural guidelines, which usually have no impact on the substantive rights of parties, are not considered mandatory, unless accompanied by a specific negative consequence of non-compliance. id. at 4403, citing French v. Edwards, 80 U.S. 506, 511 (1871). Failure to follow § 1-617.3(a)(1)(D) is generally considered to be harmless error.

Violation of § 1-617.3(a)(1)(D) only rises to the level of harmful error under OEA Rule 614.5, D.C. Reg. 4362 (1980), if the delay in proposing the adverse action is prejudicial to the employee's defense.

Hendricks v. Department of Interior, 10 M.S.P.R. 349 (1982). Petitioner has failed to cite a single way in which his defense was damaged due to the delay. He was aware of the charges against him and there was no loss of evidence or friendly witnesses because of the delay. The Agency's failure to comply with § 1-617.3(a)1)(D) thus did not constitute harmful error warranting reversal.

Petitioner asserts that the hearing examiner misconstrued both Hendricks, supra, and McGrath v. Dept. of Navy, 4 M.S.P.R. 500 (1981). In both those cases, the Merit System Protection Board held that the agency's delay of five and eleven years respectively did not constitute harmful error. Petitioner attempts to distinguish these cases by explaining that in his case the same specifications were used in a previous proposal to suspend in which a final decision was never rendered. Petitioner

fails to explain how this point is relevant to the issue of whether the employee was prejudiced by the Agency's delay. An employee must prove that he was prejudiced by the delay under § 1-617.3(a)(1)(D) before an adverse action will be reversed on the grounds of "staleness." Hendricks, supra, 10 M.S.P.R. at 354. As discussed above, the Agency's failure to comply with the procedural deadline simply did not constitute harmful error warranting reversal. The OEA's holding on this issue is not "clearly erroneous."

(2) Failure to inform Petitioner of purpose of meeting and refusal to allow the presence of counsel.

Petitioner claims that the insubordination charge resulting from specification 2 (refusal to attend second meeting) was not proven by a preponderance of the evidence. Petitioner reasons that since

he was not told the purpose of the meeting and was not permitted to be accompanied by his attorney, he was justified in disobeying an order to attend the meeting.

Although Petitioner had an earlier adverse action pending at the time, the meeting ordered by his superiors was not an adjudicatory proceeding, in which various due process rights might attach. An employer does not have the right to be informed of the charges against him in an investigatory administrative proceeding. Ashford v. Dept. of Justice, 6 M.S.P.R. 458 (1981). If no such right exists at the investigatory administrative proceeding. Ashford v. Depart. of Justice, 6 M.S.P.R. 458 (1981). If no such right exists at the investigatory state, an employer is certainly not obligated to explain the purpose of an informal meeting.

Similarly, an employee has no due process

right to be accompanied by counsel at an information or investigatory meeting. Id. Petitioner compares his case to Jones v. Farm Credit Admin., 3 M.S.P.R. 471 (1980), in which the employee was held to be justified in refusing to obey instructions which clearly would have jeopardized his pending grievance. (Jones was in effect asked to destroy evidence crucial to his pending grievance.) Unlike the clear-cut choice faced by Jones, there is no evidence that attending the meeting without counsel would have placed Petitioner's pending adverse action in serious jeopardy. Thus, Petitioner was not justified in refusing to attend the meeting at issue. Therefore, the insubordination charge should be sustained.

(3) Claim that examiner's finding of discourteous treatment toward Union Steward is clearly erroneous.

Petitioner argues that since the hearing

examiner questioned the sincerity of both Petitioner and Union Steward, it was error to rule against employee on specifications regarding the union steward. It is entirely appropriate for a finder-of-fact to weight the credibility of one witness against that of another. The hearing examiner simply found that although neither witness seemed to be telling the entire story, the testimony of the union steward was more credible than Petitioner's. (Recommended Initial Decision, p.12). The testimony of both witnesses was carefully weighted, so the finding was certainly not arbitrary. Absent a showing that the examiner's finding is arbitrary, great deference is given to the examiner on questions of credibility. Grant v. District of Columbia, 545 A.2d 1262, 1264 D.C. (1988); Gunty v. Dept. of Employment Services, 524 A.2d 1192, 1197 (D.C. 1987); Employee v.

Agency, 33 D.C.R. 7143, 7145 (Nov. 14, 1986). The examiner's finding is not clearly erroneous and thus should not be disturbed by this Court.

(4) Harshness of penalty.

Petitioner asserts that dismissal is an unduly harsh and unreasonable penalty since the examiner only sustained two counts of insubordination and three counts of discourteous treatment. But these were Petitioner's second offenses on both counts and removal is within the range of penalties permitted by the D.C.O.P. Table of Penalties Guide. (Recommended Initial Decision, pp. 13-14). Additionally, the Agency attempted an alternative to removal by referring Petitioner to a counseling service which he refused to attend. (OEA Decision, p.6) The OEA is not permitted to substitute its judgment for that of the agency in deciding the appropriateness

of a given penalty. Stokes v. District of Columbia, 502 A.2d 1006 (D.C. 1985). Likewise, this Court should defer to the judgment of the Agency in dealing with a repeatedly troublesome employee. The Agency's decision to remove Petitioner is not unreasonable under the circumstances and should not be disturbed.

CONCLUSION

For the above reasons the petition should be denied and the decision of the Office of Employee Appeals affirmed.

ACCORDINGLY, IT IS ORDERED that the petition for review is **DENIED** and the decision below is **AFFIRMED.**

Dated: March 9, 1990

* SIGNED IN CHAMBERS *

HARRIETT R. TAYLOR
Judge

APPENDIX D

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 90-CV-522

EDWARD B. SMITH,
Appellant,

v. MPA-7-89

DEPARTMENT OF HOUSING AND
COMMUNITY DEVELOPMENT,
Appellee,

Appeal from the Superior Court
of the District of Columbia
Civil Division

(Hon. Harriett R. Taylor, Trial Judge)

(Argued June 23, 1992 Decided July 31, 1992)

Before FERREN and WAGNER, Associate Judges,
and KERN, Senior Judge.

MEMORANDUM OPINION AND JUDGEMENT

Edward Smith appeals from the trial court's order which affirmed Smith's dismissal from his employment with the District of Columbia Department of Housing and Community Development ("Agency"). The trial court order

affirmed the decision by the District of Columbia Office of Employee Appeals ("OEA') which had, in turn, affirmed its hearing examiner's findings, the trial court's affirmance of his dismissal. We, however, reject all Smith's claims, and thus, we affirm his dismissal.

The record reflects that the examiner had found Smith guilty of two counts of insubordination[1] and three counts of discourteous behavior[2] and had recommended the affirmance of the Agency's decision to remove Smith. Specifically, the examiner found that Smith had been insubordinate on January 25, 1984 when he refused to meet with a superior

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[1] D.C.O.P. Rule 1608.6 (5)(6), 30 D.C. Reg. 5895 (1983).

[2] D.C.O.P. Rule 1608.6 (11)b), 30 D.C. Reg. 5898 (1983).

unless his immediate supervisor ordered Smith to do so in writing. The examiner also decided upon the evidence presented that Smith had been insubordinate on September 4, 1984, when he, on the grounds that his attorney was not present, refused the order of the Director of the Agency to meet with him. Furthermore, the examiner sustained that Agency's charge of discourteous treatment of his supervisor when she found from the evidence that on January 25, 1984, Smith displayed belligerence towards his superior. The examiner also determined that Smith had treated the union steward discourteously at the place of employment when on March 27, 1984, Smith, using profanity, threatened him with an umbrella, and again on August 23rd of the same year, threatened him with bodily harm.

First, Smith essentially argues that the trial court was clearly erroneous for

accepting the hearing examiner's credibility determination in favor of the union steward as to the incidents of threatened violence on March 27th and August 23rd. "In reviewing the OEA, we give great deference to any credibility determinations of the administrative factfinder," here, the hearing examiner. Metropolitan Police Department v. Baker, 564 A.2d 1155, 1159 (D.C. 1989. As the findings of the hearing examiner are supported by substantial evidence, "we must accept them even if there is substantial evidence in the record to support contrary findings." id. See also Grant v. District of Columbia, 545 A.2d 1262, 1264 (D.C. 1988); Gunty v. Department of Employment Services, 524 A.2d 1192, 1197 (D.C. 1987.

Next, Smith contends that the trial court's ruling was clearly erroneous since the charges based on the events of January 25th

were "stale" having been the subject of the earlier, February 22, 1984, proposal for a thirty-day suspension, which the Agency had subsequently withdrawn. He claims that D. C. Code § 1-617.2 (a) (1) - (D) (1987 Repl. requires the Agency to render a decision within forty-five days. This time standard, however, is considered as merely directory rather than mandatory. Moreover, the trial court, citing as authority, Hendricks v. Department of Interior, 10 M.S.P.R. 349, 354 (1982), found that Smith did not meet his burden of showing that he was prejudiced by the delay, and there was not harmful error warranting reversal on the grounds of "staleness." We do not find under the circumstances that this ruling was clearly erroneous.

Also, Smith challenges the hearing examiner's finding that Smith was guilty of

insubordination for refusing to meet with the Agency director without his attorney being present on the ground that such finding was not supported by sufficient evidence on the record. Specifically, he asserts that his refusal to meet with the Director was justified because (1) he had not been informed of the purpose of the meeting; (2) the earlier adverse action of February 22nd was still pending; and (3) he therefore believed he was entitled to have an attorney at the meeting. An employer is not obligated to explain the purpose of an informal or investigatory meeting, and the employee has no due process right to be accompanied by counsel when attending an informal or investigatory meeting. Ashford v. Department of Justice, 6 M.S.P.R. 458, 463-65 (1981); see also Flanagan v. Department of Army, 44 M.S.P.R. 378, 381-82 (1990. Here, Smith refused even to meet with

the Director unless his attorney was present.[3] Such refusal under the particular circumstances was unreasonable. It may be that after the meeting got underway, Smith then might have been justified in terminating the meeting if it became clear that the meeting was not actually informal or investigative, but, instead, adjudicative or prejudicial. See Ashford, 6 M.S.P.R. at 464 (due process right to representation attaches when an administrative case moves from the investigative phase to the adjudicative

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[3] On a separate occasion, Smith had also refused to meet with the deputy director without his attorney present. Because this meeting was also for investigative purposes, the deputy director was not required to allow Smith representation at this meeting. Nevertheless, the deputy director agreed to Smith's demand. Smith was also charged with insubordination because of this incidence, but the hearing examiner dismissed this charge.

phase); Jones v. Farm Credit Administration, 3 M.S.P.R. 471 (1980) (employee was held justified in refusing to obey instructions which clearing would have jeopardized his pending grievance; i.e., he was asked to destroy evidence crucial to pending grievance).

Finally, Smith argues that the penalty of removal was too harsh. Considering the evidence supporting the charges against Smith, especially as to the violence he had threatened, we cannot say the penalty is unreasonable. See Stokes v. District of Columbia, 502 A.2d 1006, 1011 (D.C. 1985 (OEA may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate).

In sum, the trial court appropriately determined that the action of OEA was " " 'supported by substantial evidence in the

record as a whole and not clearly erroneous as a matter of law.' Baker, supra, 564 A.2d at 1159 (quoting Super. Ct. Civ. R., Agency Review 1(g) (1988). In our review of the administrative record, we find that there was no "procedural error," that there {was} substantial evidence in the record to support the OEA's findings," and that OEA's action was not in some way "arbitrary, capricious, or an abuse of discretion.," See Stokes, supra, 502 A.2d at 1010. We conclude that OEA's affirmance of the Agency's decision to remove Smith is not unreasonable under the circumstances and should therefore not be overturned.[4]

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[4] The record reflects that in addition to the charges in the instant case, Smith had been suspended in 1982 for fourteen days for the same type of offenses, namely, insubordination and discourteous treatment of his supervisor.

Accordingly, it is ORDERED AND ADJUDGED that the judgment on appeal herein be, and the same is hereby, affirmed.

FOR THE COURT:

Joy A. Chapper,
Acting Clerk